

Message Text

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ACTION OPIC-12

INFO OCT-01 ARA-16 ISO-00 EB-11 COME-00 AID-20 L-03 TRSE-00

CIEP-03 OMB-01 CIAE-00 INR-11 NSAE-00 /078 W

----- 028048

R 222106Z AUG 74

FM AMEMBASSY BOGOTA

TO SECSTATE WASHDC4438

UNCLAS BOGOTA 7519

EO 11652: NA

TAGS: EINV, CO

SUBJ: GOC POSITION ON OPIC AND SUBROGATION

REF: BOGOTA 7489

INFORMAL TRANSLATION OF SUBSTANTIVE PORTIONS OF FOREIGN OFFICE
NOTE NO. 5009 DATED AUGUST 14, 1974, IN ANSWER TO EMBASSY'S
AID MEMOIRE OF FEBRUARY 6, AS FOLLOWS:

1) "AS THE CENTRAL PREOCCUPATION OF OPIC, MADE KNOWN TO THIS
MINISTRY THROUGH THE EMBASSY OF THE UNITED STATES, IS IN
KNOWING IF IT IS POSSIBLE TO RECONCILE THE REGULATIONS OR THE
POLICY OF SAID NORTH AMERICAN GOVERNMENTAL ENTITY WITH
DECISION 24 OF THE COMMISSION OF THE CARTAGENA ACCORD,
DECISION 24 THAT TODAY IS IN FORCE IN THE NATIONAL TERRITORY BY
VIRTUE OF DECREE 1900 OF SEPTEMBER 15. 1973, IT IS WELL
NORHWILE TO ANALYZE SEPARATELY EACH ONE OF THE CONSTITUENT
ELEMENTS OF WHAT APPEARS TO BE A CONSULTATION OF THE GREATEST
SPECTRUM AND TRANSCENDENCE FOR THE COLOMBIAN STATE.

2) "IN DEVELOPMENT OF THE ABOVE CRITERION, IT SHOULD BE RECALLED
TO THE ILLUSTRIOUS MISSION THAT THE NATIONAL CONSTITUTION IN ITS
ARTICLE 12 SAYS: " THE CAPACITY, RECOGNITION AND, IN GENERAL THE
REGIME OF CORPORATIONS AND OTHER JURIDICAL PERSONS, WILL BE
DETERMINED BY COLOMBIAN LAW". IN THE SAME MANNER ARTICLE 51
(1ST CLAUSE) OF DECISION 24 OF THE COMMISSION OF THE CARTAGENA ACCORD,

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IN ESTABLISHING THAT IN 'NO INSTRUMENT RELATIN TO INVESTMENTS

OR TRANSFERES OF TECHNOLOGY WILL THERE BE ADMITTED CLAUSED THAT REMOVE POSSIBLE CONFLICTS OR CONTROVERSIES FROM THE NATIONAL JURISDICTION AND COMPETENCE OF THE RECEIVING COUNTRY OR THAT PERMITS THE SUBROGATION OF STATES TO THE RIGHTS AND ACTIONS OF THEIR NATIONAL INVESTORS,' DOES NOTHING OTHER THAN STIPULATE FOR FOREIGN COMPANIES THE SAME TREATMENT THAT IS GRANTED TO NATIONAL ENTERPRISES, A NORM THAT ALSO IS INFERRED FROM THE CITED CONSTITUTIONAL DISPOSITION.

3) "THE ABOVE CITATIONS SERVE THE PURPOSE OF ANSWERING IN GOOD PART THE UNCERTAINTY FORMULATED BY THE EMBASSY, SINCE NO DISTINCTION IS MADE IN THE FUNDAMENTAL CHARTER AND COLOMBIAN LAW (DECREE 1900 OF 1973), BETWEEN NATIONAL AND FOREIGN ENTERPRISES OR COMPANIES, IT WOULD NOT BE POSSIBLE TO AUTHORIZE PRIVATE UNITED STATES ENTITIES, WHICH HAVE INVESTMENTS IN THIS COUNTRY, TO CONTINUE TO BE INSURED AND, BY VIRTUE OF THAT, SUBROGATED IN THEIR RIGHTS AND ACTIONS BY THE GOVERNMENT OF THE UNITED STATES, BACAUSE THIS WOULD SIGNIFY IMMEDIATELY THAT THE CONFLICTS OR SITUATIONS DERIVED FROM THE ESTABLISHED JURIDICAL RELATION OF THE RESPECTIVE INVESTMENT ENTITY WITH THE STATE OR COLOMBIAN JURIDICAL PERSONS, WOULD AVOID IN FACT, ACE BY VIRTUE OF THE APPROVAL OF THE NATIONAL GOVERNMENT, NATIONAL JURISDICTION, CAUSING SUCH CONTROVERSIES TO BE CONFLICTS OF INTERNATIONAL PUBLIC LAW, THAT WOULD PUT IN OPPOSITION THE INTERESTS OF THE TWO STATES (THE UNITED AND COLOMBIA). THE PRECEDING POSITION IS REVALIDATED BY THE CIRCUMSTANCE THAT BESIDES THE GOVERNMENT OF THE UNITED STATES HAVING TO ASUME THE SPOKESMANSHIP FOR OPIC IN A CONTROVERSY AS DESCRIBED, IN THE CASE OF COLOMBIA, HAVING AUTHORIZED THE SUBROGATION, THE ADMINISTRATION WOULD ESTABLISH ITSELF AS A SUBJECT OF THE JURIDICAL RELATIONSHIP THAT IS ESTABLISHED BECAUSE OF THE FOREIGN INVESTMENT. BEING, THEN, THAT THE PURPOSE OF THE CITED COLOMBIAN LEGAL NORMS IS THAT DIVERGENCIES ARRISING BETWEEN THE PARTIES, AS A CONSEQUENCE OF THE APPLICATION OR INTERPRETATION OF THE RESPECTIVE CONTRACT, (BY WHICH IS GRANTED THE ENTRY OF THE FOREIGN INVESTMENT), BE DECIDED BY LOCAL JUDGES AND TRIBUNALS AND IN CONFORMITY WITH THE LAWS OF THE NATION AND THE CONSTITUTION OF THE REPUBLIC, ONLY INCORRECTLY COULD THE MINISTRY OF EXTERIOR RELATIONS COLLABORATE SO THAT THAT WHICH IS A PRIVATE LAW PROBLEM, IS TRANSFORMED INTO A CONFLICT IN WHICH IS INVOLVED THE INTERNATIONA RESPONSIBILITY OF THE STATE.

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4) HENCE FROM ALL OF THE STUDY IS DEDUCED A CLEAR CONTRADICTION OF PRESUMPTIONS BETWEEN THOSE SUGGESTED BY HONORABLE EMBASSY AND THOSE PRESCRIBED BY DECREE 1900 OF 1973, IT WOULD REMAIN AS AN UNAVOIDABLE CONCLUSION THAT, IN THE LONG TERM, THE COLOMBIAN STATE OUGHT TO SUPPORT THE FORESSEN EFFECTS OF AN INTERNATIONAL RESPONSIBILITY DERIVED FROM THE ENTRY OF FOREIGN INVESTMENT, WHATEVER IT MIGHT BE.

5) "FOR ANOTHER THING, THE ACCEPTANCE BY THE COLOMBIAN GOVERNMENT OF THE EXPEDIENT PROPOSED BY THE ILLUSTRIOUS MISSION, OF CONSIGNING SUCH AUTHORIZATION (PROHIBITED BY ARTICLE 51 OF DECISION 24) IN RESPECTIVE INSTRUMENTS RELATING TO FOREIGN INVESTMENTS OR THE TRANSFER OF TECHNOLOGY, WOULD SIGNIFY NOTHING LESS THAN A CLASSIC CASE OF VIOLATION OF LAW, OBVIOUSLY SANCTIONABLE.

6) "THIS CHANCERY JUDGES THAT WITH THE EXPOSITION OF THE CRITERIA OF LEGAL ORDER EXPLAINED IN THE PRECEDING PARAGRAPHS, IT HAS ACQUAINTED THE ILLUSTRIOUS MISSION WITH THE MOTIVES THAT ORIENT THE TREATMENT THAT HAS TO BE GIVEN TO THE OPERATIONS THAT OPIC REALIZE IN NATIONAL TERRITORY.

7) "THE MINISTRY OF EXTERIOR RELATIONS EXPRESSED TO THE HONORABLE EMBASSY OF THE UNITED STATES THE FIRM PURPOSE OF CONTRIBUTING, IN CASE IT SHOULD BE NECESSARY, FURTHER EXPLANATION ABOUT THE POSITION ADOPTED IN THE PRESENT NOTE VERBAL AND AVAILS ITSELF OF THIS OPPORTUNITY TO REITERATE THE ASSURANCES OF ITS HIGHEST AND MOST DISTINGUISHED CONSIDERATION".
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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: INVESTMENT LAW, AIDE MEMOIRE, FOREIGN INVESTMENTS, RESOLUTION 24
Control Number: n/a
Copy: SINGLE
Draft Date: 22 AUG 1974
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: n/a
Disposition Approved on Date:
Disposition Authority: n/a
Disposition Case Number: n/a
Disposition Comment:
Disposition Date: 01 JAN 1960
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1974BOGOTA07519
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D740232-0916
From: BOGOTA
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1974/newtext/t19740828/aaaaaxhz.tel
Line Count: 136
Locator: TEXT ON-LINE, ON MICROFILM
Office: ACTION OPIC
Original Classification: UNCLASSIFIED
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 3
Previous Channel Indicators:
Previous Classification: n/a
Previous Handling Restrictions: n/a
Reference: BOGOTA 7489
Review Action: RELEASED, APPROVED
Review Authority: shawdg
Review Comment: n/a
Review Content Flags:
Review Date: 17 JUN 2002
Review Event:
Review Exemptions: n/a
Review History: RELEASED <17 JUN 2002 by reddocgw>; APPROVED <30 JAN 2003 by shawdg>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: GOC POSITION ON OPIC AND SUBROGATION
TAGS: EINV, CO, OPIC, ANCOM
To: STATE
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005